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# Pulte Home Corporation Order on Fourth Party Defendant Construction Materials, Inc's Consolidated Motion to Dismiss Southern Watershapes, Inc.'s Fourth Party Complaint

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*Fulton County Superior Court*

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IN THE SUPERIOR COURT OF FULTON COUNTY  
BUSINESS CASE DIVISION  
STATE OF GEORGIA

PULTE HOME CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action File No.
	)	2015CV267588
	)	
CHOATE CONSTRUCTION COMPANY,	)	
	)	
Defendant / Third Party Plaintiff	)	
	)	
v.	)	
	)	
SOUTHERN WATERSHAPES, INC. and	)	
NORTH GEORGIA WALLS, INC.,	)	
	)	
Third-Party Defendants	)	
	)	
v.	)	
	)	
SOUTHERN WATERSHAPES, INC.,	)	
	)	
Third Party Defendant/	)	
Fourth Party Plaintiff	)	
	)	
v.	)	
	)	
CONSTRUCTION MATERIALS	)	
SERVICES, INC.	)	
	)	
Fourth Party Defendant.	)	
	)	

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**ORDER ON FORTH PARTY DEFENDANT CONSTRUCTION MATERIALS, INC.'S**  
**CONSOLIDATED MOTION TO DISMISS SOUTHERN WATERSHAPES, INC.'S**  
**FOURTH PARTY COMPLAINT**

Before this Court is Fourth Party Defendant Construction Materials Services, Inc.'s Consolidated Motion to Dismiss seeking dismissal of all claims asserted by Fourth Party Plaintiff Southern Watershapes, Inc. ("SWI") in the Fourth Party Complaint filed March 15, 2017.

[A] motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof, and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought . . . .

*Scouten v. Amerisave Mortgage Corp.*, 238 Ga. 72, 73 (2008) (quoting *Anderson v. Flake*, 267 Ga. 498, 501 (1997)); *see also* O.C.G.A. § 9-11-12(b)(6). In ruling on a motion to dismiss, the Court must accept as true all of plaintiff's well-pleaded factual allegations, and draw all reasonable inferences in plaintiff's favor. *Baker v. McIntosh County Sch. Dist.*, 264 Ga. App. 509, 509 (2003).

According to the allegations in the Fourth Party Complaint, this action arises from alleged defects in the construction of retaining walls, pools, and decks at the Sun City Peachtree Amenity Center Construction project in Griffin, Georgia ("Project"). In October 2015, Plaintiff Pulte Home Corporation ("Pulte") filed a Complaint alleging that Defendant Choate Construction Company ("Choate") breached certain express warranties concerning, *inter alia*, the construction of the retaining walls and the soil backfill for the walls, and both pools and surrounding decks for the pools. In October 2016, Choate filed a Third Party Complaint against SWI and North Georgia Walls, Inc., asserting claims for contractual defense and indemnity against SWI and a claim for contractual indemnity against North Georgia Walls. SWI denies liability.

Choate subcontracted with SWI to design and construct both the indoor and outdoor pool, associated mechanical equipment, and the pool decks surrounding the pools. According to the Fourth Party Complaint, CMS was hired by either Pulte, Minerva or North Spalding and compensated for its inspection and testing services on the Project. CMS provided field inspection services including the testing and evaluation of soils used to construct the retaining

walls and subgrade at the pools and decks. CMS created daily “Field Inspection Reports” concerning the observation and testing of the soil. SWI alleges CMS’s field inspection reports negligently misrepresented the suitability and sufficiency of the soil compaction for construction of the pools, CMS knew SWI was relying on their reports, and SWI reasonably relied on those representations when it proceeded with its work. SWI states in its Complaint that if Choate suffered any damages as a result of inadequate compaction of the foundational soils, it was due to the fault of CMS, not SWI.

On January 17, 2017, SWI informed CMS that SWI was vouching CMS into court pursuant to O.C.G.A. § 9-10-13. CMS declined to participate in the litigation. In March 2017, this Court granted SWI’s motion to add CMS as a fourth party defendant in this action, and SWI filed its Fourth Party Complaint against CMS alleging (1) implied and equitable indemnification and (2) breach of obligations under O.C.G.A. § 9-10-13. CMS argues both claims fail as a matter of law and that the Fourth Party Complaint fails to meet the impleader requirements of O.C.G.A. § 9-11-14.

#### **COUNT ONE: IMPLIED AND EQUITABLE INDEMNITY**

CMS first argues Count One for Implied and Equitable Indemnity fails as a matter of law. This Court agrees. SWI has not stated a claim for contractual or common law identity. Instead, the allegations in the Fourth Party Complaint lay out the elements for negligent misrepresentation. Under Georgia law, no cause of action for implied and equitable indemnity arises from negligent misrepresentation. Rather, Georgia law recognizes “two broad categories of indemnity: indemnity as created by contract, as between a surety and a debtor; and under common law of vicarious liability, as between principals and agents.” *District Owners Ass’n, Inc. v. AMEC Environmental & Infrastructure, Inc.*, 322 Ga. App. 713, 715 (2013). An action

arising under common law of vicarious liability may be maintained when a person is compelled to pay damages because of negligence imputed to him as a result of a tort committed by another. *Id.* at 715-16. To be liable under an imputed negligence or vicarious liability theory, a legally recognized relationship such as that of a principal and an agent or an employer and an employee must be present. *Id.* at 715.

Here, SWI's Fourth Party Complaint "by its very language . . . does not allege contractual indemnity or vicarious liability based on agent-principal or employer-employee relationship." *District Owners Ass'n Inc.*, 322 Ga. App. at 716. The Fourth Party Complaint does not allege any facts to suggest that there was a relationship between SWI and CMS which would lead to imputing liability on SWI for CMS's acts or omissions. When no allegations of imputed negligence or vicarious liability have been made, common law indemnity principles do not apply. *District Owners Ass'n Inc.*, 322 Ga. App. at 716. Accordingly, CMS's Motion to Dismiss is **GRANTED** with respect to Count One.

#### **1. COUNT TWO: BREACH OF O.C.G.A. § 9-10-13**

SWI alleges that CMS breached its duties under O.C.G.A. § 9-10-13 when it repudiated SWI's Vouchment Notice. Georgia courts have held that O.C.G.A. § 9-10-13 does not establish any obligations that can be breached by the vouchee, instead, O.C.G.A. § 9-10-13 serves as an evidentiary law that makes certain findings of prior judgment binding and conclusive upon the vouchee in a subsequent separate action. *Hardee v. Allied Steel Blds.*, 182 Ga. App. 587, 587 (1987). In *Hardee*, the Georgia Court of Appeals found that O.C.G.A. § 9-10-13 only serves to make defendant's liability to the plaintiff and the amount of that liability binding upon the vouchee. *Hardee*, 182 Ga. App. at 587 (holding that the vouchee has the option to assert defenses against the voucher's liability to the plaintiff but no judgment is rendered against the

vouchee in the original action.). “If the vouchee objects to the vouchment she can ignore it, but she does so at her peril because the statute makes the judgment binding on her, and by the facts may reflect her own liability to the defendant.” *Id.* at 588. “[N]othing is established by refusal to participate as a vouchee, other than the statutory consequences specifically provided by O.C.G.A. § 9-10-13.” *Smith v. Transamerica Ins. Co.*, 218 Ga. App. 839, 840 (1995). Therefore, because SWI’s vouchment of CMS did not create an obligation for CMS, CMS did not breach by refusing to participate in the suit between Choate and SWI.

Additionally, CMS did not repudiate a contract when it refused to participate under the vouchment statute in the litigation between Choate and SWI. The anticipatory repudiation of a contract occurs when one party repudiates its *contractual obligation* to perform prior to the time such performance is required under the terms of the contract. *Coffee Butler Service, Inc. v. Sacha*, 258 Ga. 192, 193 (1988) (emphasis added). There is no allegation of a contract, written or otherwise, between SWI and CMS before, during, or after the completion of the Project. Because there was no contractual agreement between CMS and SWI the terms and duties of which CMS could have repudiated, SWI’s repudiation argument fails as a matter of law. Accordingly, CMS’s Motion to Dismiss is **GRANTED** with respect to Count Two.

#### **IMPLEADER UNDER O.C.G.A. § 9-11-14**


Additionally, CMS alleges that the Fourth Party Complaint has failed to plead secondary or derivative liability as required under O.C.G.A. § 9-11-14 and should be dismissed. A third-party complaint must be against one “who is or may be liable to him for all or part of the plaintiff’s claim against him.” O.C.G.A. § 9-11-14(a).

A defendant cannot assert an entirely separate claim against the third-party even though it arises out of the same general set of facts as the main claim. There must be an attempt to pass on to the third-party all or part of the liability asserted against the defendant but not to tender the third party as a substitute defendant.

Only one who is secondarily liable to the original defendant may be brought in as a third-party defendant, as in cases of indemnity, subrogation, contribution, warranty and the like.

*Lamb v. K.M. Ins. Co.*, 208 Ga. App. 746, 746 (1993) (citations omitted). Because the Fourth Party Complaint fails to plead secondary or derivative liability, the Fourth Party Complaint does not meet the impleader requirements of O.C.G.A. § 9-11-14. Accordingly, CMS's Motion to Dismiss is **GRANTED**.

SO ORDERED this 21 day of July, 2017.

  
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JUDGE JOHN J. GOGER  
Superior Court of Fulton County  
Business Case Division  
Atlanta Judicial Circuit



**Copies to: All registered eFileGA users associated with this case.**

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